Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
April 06, 2016

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	BK-S-13-14209-MKN
BIG TOWN MECHANICAL, LLC, a Nevada limited liability company,	Chapter 7
Debtor.	
YVETTE WEINSTEIN, Trustee,	Adversary No. 15-01075-MKN
Plaintiff,	Date: September 17, 2015 Time: 1:30 p.m.
v.	
SOUTHWEST SPECIALTY CONTRACTORS, LLC, a Nevada limited liability company,	
Defendant.	

MEMORANDUM DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

On September 17, 2015, the court heard the Motion for Summary Judgment ("MSJ")

[1] In this Memorandum Decision, all references to "ECF No." are to the numbers assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of the court. All references to "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "NRS" are to provisions of the Nevada Revised Statutes. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

brought by defendant Southwest Specialty Contractors, LLC. (AECF No. 7).[2] The appearances of counsel were noted on the record. After oral arguments were presented, the matter was taken under submission.

BACKGROUND

On May 14, 2013, Big Town Mechanical, LLC ("Debtor") filed a voluntary Chapter 7 petition ("Petition"). The case was assigned to Yvette Weinstein to serve as the Chapter 7 bankruptcy trustee ("Trustee"). On May 12, 2015, the Trustee commenced the above-captioned adversary proceeding against Southwest Specialty Contractors, L.L.C. ("Defendant") seeking to avoid certain payments received by the Defendant from the Debtor. The claims are brought under Sections 547 and 550.

Defendant maintains that from July 1996 until September 2013, the Debtor was a licensed contractor in the State of Nevada. In November 2012, Debtor, as the higher-tiered contractor, hired Defendant, as the lower-tiered contractor, to furnish work, materials and equipment on a private construction project for an entity known as Switch Communication, located in Clark County, Nevada ("Switch Project").

Defendant performed work for the Debtors pursuant to a subcontract agreement. See Swanson Affidavit at ¶5. On or about January 29, 2013, Defendant issued Invoice #10118-01 in the amount of $18,135.00 for work performed through December 31, 2012 and Invoice #10118-02 for work performed through January 31, 2013. Id. at ¶¶6-8; see also MSJ Exhibits "4": and "6." Defendant included a statutory Conditional Waiver and Release upon Progress Payment with each Invoice. See MSJ Exhibits "5" and "7."

On March 1, 2013, as required by NRS 624.624(1)(a), the Debtor issued a check to Defendant in the amount of $18,135.00 to pay Invoice #10118-01. See MSJ Exhibit "8."

On or about April 5, 2013, as required by NRS 624.624(1)(a), the Debtor issued a check

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[2] There are 14 exhibits attached to the MSJ. Exhibit "1" is the affidavit of Noah G. Allison ("Allison Affidavit") by which Defendant's counsel attempts to authenticate Exhibits "10" through "14." Attached as Exhibit "2" to the MSJ is the Affidavit of Herb Swanson ("Swanson Affidavit"), vice president of the Defendant, by which he attempts to authenticate Exhibits "3" through "9." No objections to the exhibits have been raised.

to Defendant in the amount of $18,135.00 to pay Invoice #10118-02. See MSJ Exhibit "9." The total amount paid on the two invoices was $36,270.00.

On May 14, 2013, within ninety days after it paid the two invoiced, Debtor filed its voluntary bankruptcy petition.

On May 7, 2014, counsel for the Trustee sent a letter to Defendant demanding the return of $36,270.00. See MSJ Exhibit "10." On May 8, 2014, counsel for the Defendant sent correspondence disputing the demand, along with supporting documents asserting defenses under a construction trust fund theory and an "earmarking" theory. Defendant maintains that the Trustee never responded to its correspondence. Over a year later, however, the Trustee commenced the instance adversary proceeding seeking to avoid the two payments as preferences under Section 547 and to recover the funds under Section 550.[3]

In lieu of an answer to the Trustee's complaint, Defendant filed the instant MSJ along with a Statement of Undisputed Facts ("SUF") (AECF No. 8). The MSJ originally was scheduled to be heard on September 1, 2015, but was continued to September 17, 2015, by stipulation. (AECF Nos. 11 and 12).

On September 3, 2015, the Trustee filed an opposition to the MSJ without any supporting declarations or exhibits ("Opposition"). (AECF No. 16). Instead of complying with Local Rule 7056(c),[4] the Trustee included in her Opposition a "Trustee's Version of SWSC's Statement of Undisputed Facts," stating that she "does not take exception to the facts as stated in item numbers 1 through 8, but rather, she contends that item numbers 8 through 12 remain in dispute." See Opposition at 2 -3. Instead, of objecting to specific portions of the SUF, the Trustee argues that the critical portions of the Swanson Affidavit are based on information and belief rather than personal knowledge. As a result, the Trustee argues that genuine issues of

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[3] On June 9, 2015, Defendant's counsel sent a second letter to Trustee's counsel enclosing a copy of its May 8, 2014 correspondence, and alleges that no response was received from the Trustee or her counsel to either correspondence.

[4] Local Rule 7056(c) provides that "Any party opposing a motion for summary judgment must reproduce the itemized facts in the statement of undisputed facts and admit those facts which are undisputed and deny those which are disputed."

material fact remain in dispute.

On September 9, 2015, Defendant filed its reply ("Reply"). (AECF No. 17).

APPLICABLE LEGAL STANDARDS

A motion for summary judgment filed in an adversary proceeding is governed by FRCP 56 which is applicable in adversary proceedings pursuant to FRBP 7056. See Silva v. Smith's Pac. Shrimp, Inc. (In re Silva), 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995).

The party moving for summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A motion for summary judgment should be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP 56(a). For summary judgment purposes, a fact is "material" if it might affect the result of the suit under the governing substantive law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. The moving party's evidence is judged by the same standard of proof applicable at trial. See Celotex Corp. v. Catrett, 477 U.S. at 323; see also Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003).

The burden of proof is on the party seeking the summary judgment, but the inferences are viewed in favor of the opposing party. See Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 456 (1992); see also Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987 (9th Cir. 2006). The moving party's evidence is judged by the same standard of proof that is applicable at trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985); see also Southern Calif. Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003). A trial court may not weigh the evidence in resolving such motions; rather, it determines only whether a material factual dispute remains for trial. See Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir. 1997).

DISCUSSION

Defendant maintains that it is entitled to judgment as a matter of law on essentially two grounds: (1) that property of the estate was not transferred either because the funds received by

the Defendant were "earmarked" for its benefit, or, that the funds were the subject of a construction trust imposed by Nevada law; and (2) the funds received by the Defendant were part of a contemporaneous exchange for new value.

1. Avoidance of a Preferential Transfer under Section 547.

The Trustee alleges that the Debtor made a preferential transfer of property under Section 547 that is recoverable from the Defendant under Section 550.

Under Section 547(b), a trustee may avoid certain transfers made by the debtor within 90 days before the filing of the bankruptcy petition. "A transfer by the debtor constitutes an avoidable preference if six elements are shown: (1) a transfer of an interest of the debtor in property; (2) to or for the benefit of a creditor; (3) for or on account of an antecedent debt; (4) made while the debtor was insolvent; (5) made on or within 90 days before the date of the filing of the petition; and (6) one that enables the creditor to receive more than such creditor would receive in a Chapter 7 liquidation of the estate." In re Superior Stamp & Coin Co., Inc., 223 F.3d 1004, 1007 (9th Cir. 2000).

For purposes of Section 547, a debtor is presumed to have been insolvent on and during the 90 days immediately preceding the filing of the bankruptcy petition. See 11 U.S.C. §547(f). The trustee has the burden of proving the avoidability of a transfer under Section 547(b), and the defendant has the burden of proving an applicable defense under Section 547(c). See 11 U.S.C. §547(g).

The Complaint alleges that: (1) the Debtor transferred $36,270.00 to the Defendant within 90 days of the Petition Date; (2) the Defendant was a pre-petition creditor of the Debtor; (3) the funds were paid to the Defendant on account of an antecedent debt; (4) the Debtor was insolvent on the Petition Date; and (5) the Defendant received more than it would have in this Chapter 7 proceeding if the transfer was not made.

Neither the Defendant nor the Trustee dispute that the Debtor transferred $36,270.00 to the Defendant within 90 days of the Petition filing, that the Defendant was a pre-petition creditor of the Debtor, that the funds paid to the Defendant were on account of an antecedent debt, that the Debtor was insolvent at the time of the transfers, or that the Defendant received more than it

would have in this Chapter 7 proceeding and if the transfer had not been made. The Trustee does not dispute that the Defendant performed the work for which they received the $36,270.00 payment from the Debtor. The only issues raised by the MSJ is whether the payments were made from property of the Debtor and whether the Defendant can assert a contemporaneous exchange defense under Section 547(c)(1).[5]

2. Transfer of Property of the Debtor.

The Bankruptcy Code does not define "an interest of the debtor in property." However, case law has interpreted the phrase to mean "property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." Begier v. Internal Revenue Service, 496 U.S. 53, 58 (1990).

To determine whether the property transferred belongs to the debtor for purposes of Section 547, courts apply the "diminution of estate" doctrine. See Superior Stamp & Coin, 223 F.3d at 1007. "Under this doctrine, a transfer of an interest of the debtor in property occurs where the transfer 'diminish[es] directly or indirectly the fund to which creditors of the same class can legally resort for the payment of their debts, to such an extent that it is impossible for other creditors of the same class to obtain as great a percentage as the favored one.'" Id., quoting 4 COLLIER ON BANKRUPTCY ¶ 547.03, at 547-26 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 1993). Property belongs to the debtor under Section 547 if its transfer will deprive the estate of something that would otherwise be used to satisfy the claims of creditors. Id.; see also In re Kemp Pacific Fisheries, Inc., 16 F.3d 313, 316 (9th Cir. 1994). There is an exception to this general rule known as the earmarking doctrine. See Superior Stamp & Coin, 223 F.3d at 1007; see also In re Adbox, Inc., 488 F.3d 836, 841 (9th Cir. 2007).

A. The Earmarking Doctrine.

The earmarking doctrine has been applied "'when a third party lends money to a debtor for the specific purpose of paying a selected creditor.'" See Superior Stamp & Coin, 223 F.3d at

[5] For some reason, the Trustee did not file a countermotion for summary judgment. Thus, the court will decide only the merits of Defendant's request at this juncture although its determinations of certain legal issues may be dispositive at trial or a future summary proceeding.

1007, quoting Kemp Pacific Fisheries, 16 F.3d at 316.

A key inquiry for whether a third party transfer is voidable is the source of control over the funds. See Superior Stamp & Coin, 223 F.3d at 1007. If the debtor controls the disposition of the funds and designates the creditor to be paid, independent of a third party whose funds are being used to pay the debt, then the payments made by the debtor to the creditor constitute a preferential transfer. Id. at 1009; see also Kemp Pacific Fisheries, 16 F.3d at 316.

Defendant has provided no documentation nor any other evidence of an agreement or contract between the Debtor and the Swift Project Owner (or any other person) with respect to how any funds would be paid to the Defendant. Defendant's alleged evidence in support of such an agreement is the testimony, on information and belief, of its own vice president, rather than any testimony from the Debtor or the Swift Project owner. The statements of Defendant's officer are:

> On information and belief, and based on my years of experience in the construction industry, sometime between January 29, 2013 and March 1, 2013, Big Town applied for payment to the owner of the Switch Project. In its payment application to the owner, Big Town would have included SWSC's Invoice 10118-01 and SWSC's Conditional Waiver and Release, thereby representing to the owner that $18,135.00 of the amount requested was earmarked for payment to SWSC per the invoice. The Switch Project Owner thereafter would have paid Big Town the amount requested in its payment application, including the $18,135.00 invoiced by SWSC.
>
> On information and belief, and based on my many years of experience in the construction industry, sometime between January 29, 2013 and April 5, 2013, Big Town applied for payment to the owner of the Switch Project. In its payment application to the owner, Big Town would have included SWSC's Invoice 10118-02 and SWSC's Conditional Waiver and Release, thereby representing to the owner that $18,135.00 of the amount requested was earmarked for payment to SWSC per the invoice. The Switch Project Owner thereafter would have paid Big Town the amount requested in its payment application, including the $18,135.00 invoiced by SWSC.

Swanson Affidavit at ¶¶ 10 and 12.

In its Reply, Defendant further asserts that "SWSC obviously does not possess Big Town's payment applications in order to make a definitive statement as to how Big Town invoiced the owner. But SWSC can, and did, offer a sworn statement of the standard practice in the industry." Reply at 3:20-22. Evidence of standard industries practices, of course, hardly

establishes that the practice was actually followed, especially by a financially troubled entity. The earmarking doctrine itself requires proof of an actual agreement between the parties, not an expectation or desire of a third party. There is no proof in the record that the funds used to pay the Defendant's invoices originated from the Swift Project owner. Indeed, the Subcontract Agreement itself acknowledges that the Debtor may receive payment from other sources, i.e., a "Prime Contractor or Owner . . ." MSJ Exhibit 3 at pp. 6-7.

Defendant heavily relies on In re Sierra Steel, Inc., 96 B.R. 271 (B.A.P. 9th Cir. 1989) to support its argument. Sierra Steel was decided prior to Superior Stamp & Coin, however, and does not support Defendant's position. Superior Stamp & Coin does not identify a tracing element for the earmarking doctrine. In Sierra Steel, the court stated that "[a]lthough cases applying the earmarking doctrine do not expressly state that a defendant was required to trace the earmarked funds, tracing is generally not an issue in those cases as the property is readily identifiable." 96 B.R. at 275. The Sierra Steel court believed that "[p]olicy reasons support a tracing requirement as a prerequisite to application of the earmarking doctrine. In a situation such as this, where the debtor deposits the funds into its general account, in the absence of a tracing requirement, any creditor who could prove that it was the intended beneficiary of a loan or a payment by a third party to the debtor could retain a preferential payment out of the debtor's general account notwithstanding the fact that such transfer would deplete the assets available for similarly situated creditors." Id. That Superior Stamp & Coin failed to discuss a tracing element, of course, does not mean that a tracing requirement is ill-advised or non-existent. In other contexts, the policy discussed in Sierra Steel is applied to require tracing of fraudulently obtained funds that are commingled by a wrongdoer. See generally Elliott v. Bumb, 356 F.2d 749, 755 (9th Cir.), cert. denied, 385 U.S. 829 (1966).

Even if this court were to apply the tracing element discussed in Sierra Steel, however, the Defendant has failed to trace any of the funds it was paid and it is the Defendant's burden to do so under Adbox. The Adbox court set forth the burden of proof for the earmarking doctrine as follows:

> We follow well-established law in holding that the trustee bears the initial burden of establishing that a transfer is an avoidable

> preference under §547. See Sierra Steel, 96 B.R. at 274. If, however, the trustee establishes that the transfer of the disputed funds was from one of the debtor's accounts over which the debtor ordinarily exercised total control, we follow the approach in Sierra Steel and find that the trustee makes a preliminary showing of an avoidable transfer "of an interest of the debtor" under §547(b). The burden then shifts to the defendant in the preference action to show that the funds were earmarked.

488 F.3d at 842. Defendant argues that under Sierra Steel, "[t]racing the funds is required as a prerequisite to the application of the Earmarking Doctrine." MSJ at 6:27-28. It asserts that "There is no doubt the owner paid Big Town with the expectation and understanding that Big Town would pay SWSC's invoices of out of the payments," and that "there is no question Big Town in fact paid SWSC's invoices out of the funds received from the owner on the Switch Project." Id. at 7:17-18 and 20-21. The only evidence to support these arguments is Mr. Swanson's industry-standard belief and the checks received from the Debtor that were paid out of its "General Account #2." See Swanson Affidavit at ¶ 10 and MSJ Exhibits 8, and 9. Defendant has failed to provide any evidence, based on personal knowledge, that the Switch Project owner paid the Debtor anything or that the checks made to Defendant out of the Debtor's General Account #2 came from the owner on the Switch Project. On its face, Defendant failed to meet its burden on summary judgment of establishing that there was an agreement between the Debtor and the Switch Project owner to earmark the funds for the Defendant, or, that the Defendant was paid from funds the Debtor received from the Switch Project owner.

Application of the earmarking doctrine also would conflict with the express language of the "Subcontract Agreement" submitted as Exhibit 3 to the MSJ. Attachment 1 to the Subcontract Agreement sets forth the Terms and Conditions of the Subcontract. Pages 6 and 7 of the attachment includes, in pertinent part, the following language:

> Subcontractor acknowledges and agrees that Big Town may decline to approve any Payment Application in full or in part reasonably necessary to protect the Owner, the Prime Contractor, a higher-tiered subcontractor or Big Town from any of the following: (i) unsatisfactory Work progress . . . .
>
> Progress Payments: Within ten (10) calendar days of the date the last of the following occurs: (i) Big Town actually receives payment from the Prime Contractor or Owner, as the case may be for all or a part of Subcontractor's Work furnished during a given payment application period, (ii) Subcontractor has strictly complied with the conditions

> precedent to Subcontractor's right to payment discussed below, and (iii) Big Town does not possess an independent right to withhold payment from Subcontractor, Big Town will pay Subcontractor ninety percent (90%) of the value of the Work Subcontractor furnished during that calendar month, with ten percent (10%) to be held as retention.
>
> Joint Checks or Direct Payment. At Big Town's discretion and election, payments to be made to Subcontract shall be by a direct or joint check to (i) Subcontractor and/or its lower-tiered subcontractors and suppliers . . .
>
> IN THE EVENT THE OWNER, THE PRIME CONTRACTOR, OR THE HIGHER-TIERED SUBCONTRACTOR PAYS BIG TOWN LESS THAN ALL MONIES DUE, BIG TOWN, INCLUDING AMOUNTS ATTRIBUTABLE TO SUBCONTRACTOR'S WORK, BIG TOWN **IN ITS SOLE DISCRETION** MAY APPORTION THE NONPAYMENT EQUITABLY AMONG ITSELF AND ITS VARIOUS SUBCONTRACTORS AND SUPPLIERS AND REDUCE THE PAYMENTS OTHERWISE DUE SUBCONTRACTOR ACCORDINGLY. Notwithstanding the foregoing, should a court of competent jurisdiction find that a pay-if-paid clause is not enforceable in the State of Nevada, then payment provisions set forth above shall be construed to operate as a pay-when-paid clause.
>
> RIGHT TO SET-OFF. Big Town may withhold and set-off against amounts due and payable to Subcontractor under this Subcontract or any other subcontract or agreement that may be entered into between the Parties, all damages, backcharges, expenses, fees, and any other amounts that Big Town may incur or has incurred. As long as such withholding and set-off is exercised by Big Town in good faith, Subcontractor hereby waives any claims against Big Town for any consequential damages flowing from such withholding or set-off, even if it is later determined that such withholding or set-off was improper.

(emphasis added). It is clear from the express language of the Subcontract Agreement that the Debtor had sole discretion when and how to make payments to Defendant, which the Defendant was aware of when it entered into the Subcontract Agreement. Thus, even if the source of the funds used to pay the Defendant was the Switch Project owner, the control of the use of those funds contractually remained in the Debtor.

On this record, the earmarking doctrine would not apply as the payments made to the Defendant would have been from property of the Debtor rather than property of the Switch Project owner outside of the Debtor's control.

B. Construction Trust Fund Theory.

The transfer of property that a debtor holds in trust for another is not a voidable preference. Trust assets are not "property of the estate" and their transfer does not diminish the assets available to creditors. See Begier v. Internal Revenue Service, 496 U.S. at 58-60.

Whether property is truly held in trust for another is determined by reference to state law and applied in a manner consistent with bankruptcy law. See In re North American Coin & Currency, Ltd., 767 F.2d 1573, 1575 (9th Cir. 1985). Where a creditor receives funds held in trust for it by the debtor that were commingled with the debtor's own funds, the creditor bears the burden of tracing the funds specifically and directly back to the trust. If it fails to do so, the court may presume all funds received by the creditor were the debtor's property and the transfer is an avoidable preference. See In re Morris, 260 F.3d 654, 670 (6th Cir. 2001); see also In re Advent Management Corp., 104 F.3d 293, 295-296 (9th Cir. 1997).

The Sierra Steel court found that there were no express statutory provisions under Nevada law creating a "construction fund trust," nor any Nevada authority to support the imposition of such a trust through equitable principles or indirect statutory support. 96 B.R. at 274.

Defendant argues that in 2002, twelve years after Sierra Steel was decided, Nevada in fact enacted a construction trust fund statute in the form of the Nevada Prompt Payment Act codified in NRS 624.624. Defendant also argues that the Nevada statute supports an earmarking doctrine by operation of law, because failure to pay or a diversion of the funds to pay subcontractors, can result in civil and criminal penalties under NRS 624.3012(2) and/or NRS 624.750. While it may be true that these Nevada statutes provide potential civil and criminal remedies for the failure to pay or the willful and deliberate diversion of funds, these statutes simply do not create an earmarking defense nor any equitable construction trust fund theory.[6] Defendant concedes that this statute does not *expressly* state that it is a construction fund trust law and urges the court to "consider a statute's effect, not its word choice."[7] Reply at 2:8.

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[6] As a general proposition, only constructive trusts imposed prior to commencement of a debtor's bankruptcy are given effect. Imposition of a constructive trust in favor of certain creditors after commencement of a bankruptcy case is inconsistent with the policy of ratable distribution in bankruptcy. Where state law provisions do not clearly impose a trust on property held by a debtor, e.g., a construction fund trust, a bankruptcy court should be hesitant to recognize the existence of a trust to the detriment of all other creditors.

[7] At the MSJ hearing, Defendant's counsel asked the court what language would need to be included in the statute for this court to determine that it is an express construction trust fund

Defendant argues that the Nevada Prompt Payment Act functions the same as construction trust fund statutes from Texas and Colorado, even though the Colorado and the Texas statutes *expressly* and specifically state that payments and funds made or disbursed to a contractor are trust funds or funds to be held in trust for the payment of subcontractors.[8]

The Nevada Prompt Payment statute is just that - a prompt payment statute without any indication or specific language to suggest that any monies are held in trust. Instead, a plain reading of the statute reveals that a higher-tiered contractor can withhold an amount from a payment to be made to a lower-tiered subcontractor for various reasons provided they give a reasonably detailed explanation of the condition or the reason for withholding the amounts. See NRS 624.624(3) and (3)(b). This statute clearly gives the higher-tiered contractor the ability to withhold funds for various reasons, including those stated under a written agreement with a lower-tiered subcontractor.[9] The plain language of this statute simply does not have the effect of creating a trust fund and actually conflicts with such an effect.

The Subcontract Agreement includes language taken directly from NRS 624.624 and

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statute. Obviously the court is not a scrivener for the Nevada legislature, but inclusion of the words "construction trust fund" would help. At a bare minimum, reference to the funds being *held in trust* by the contractor would seem to be required. But the Nevada Prompt Payment statute doesn't include that language either. In its reply, Defendant sets forth a nifty table providing a side-by-side comparison of relevant provisions of the Nevada Prompt Payment statute and the Texas and Colorado construction trust fund statutes. See Reply at 4-5. Even Defendant's table, however, illustrates that the Texas and Colorado legislatures specifically referred to construction payments as trust funds. That all three legislatures prescribed criminal penalties for violation of each statute is immaterial to determining the manner in which construction payments are held. Moreover, to the extent that criminal penalties are imposed, reading a trust obligation into the Nevada Prompt Payment law where no such language exists may well render the statute impermissibly vague to support a criminal prosecution.

[8] Construction trust fund statutes typically arise in bankruptcy proceedings in connection with objections to dischargeability of individual debts. See, e.g., Ratliff Ready-Mix, L.P. v. Pledger, 592 Fed.Appx. 296, 299 (5th Cir. 2015)(Texas Trust Fund Statute established fiduciary duty for purposes of nondischargeability exception under Section 523(a)(4)); Stoughton Lumber Co., Inc. v. Sveum, 787 F.3d 1174, 1176 (7th Cir. 2015)(Wisconsin Construction Trust Fund Statute created fiduciary obligations recklessly violated by debtor under Section 523(a)(4)).

[9] The written agreement, however, cannot conflict with the express requirements of the Nevada Prompt Payment Act. See West Charleston Lofts I, LLC v. R&O Construction Co., 400 Fed.Appx. 248, 250 (9th Cir. 2010).

provides reasons for being able to withhold payment to a lower-tiered subcontractor, including problems with the subcontractor's work product. Inasmuch as the Debtor has the ability to withhold payments to a lower-tiered subcontract under both NRS 624.624 and the Subcontract Agreement, the Debtor clearly has control over how the funds are to be used and how payments are to be made.

Under Sierra Steel, "[e]ven if a 'construction fund trust' existed under Nevada law, a laborer/materialman is only entitled to funds under a trust if it can prove that the money it received or claims can be traced to funds paid to the subcontract by the contractor." 96 B.R. at 724. For argument sake, even if the court were to agree that funds received by a higher-tired contractor are to be held in trust, the Defendant has not provided evidence to trace the funds received by the Debtor. Instead, the copies of the checks provided by the Defendant indicate that payment was made out of the Debtor's "General Account #2." See MSJ Exhibits 8 and 9.

On this record, a construction trust fund theory also would not apply and the payments made to the Defendant would have been from property of the Debtor rather than property of the Switch Project owner.[10]

3. Contemporaneous Exchange for New Value Under 11 U.S.C. §547(c)(1).

A preferential transfer may not be avoided if it was: (1) intended to be a substantially contemporaneous exchange for new value given by the debtor, and (2) the transfer was in fact a substantially contemporaneous exchange. See 11 U.S.C. §547(c)(1). The contemporaneous exchange must result in the debtor receiving "new value" for the preferential transfers. Id. New value is money or money's worth in goods, services, or new credit and also includes the return of property previously transferred or its proceeds. See 11 U.S.C. §547(a)(2). The burden of establishing the new value received by the debtor rests upon the creditor asserting the defense. See Creditors' Committee v. Spada (In re Spada), 903 F.2d 971, 976-77 (9th Cir. 1990).

[10] Defendant argues that in Nevada, the time to perfect a lien is at most 90 days from the date of the completion of the project, and that it has surrendered its lien rights against the property when it received payment from the Debtor. See NRS 108.226 and 108.2457. It maintains that if the Trustee is allowed to avoid and recover those payments two years after they were made, it would leave the Defendant with no recourse, as the time to perfect its lien has long past. See Reply at 7:9-16.

To prevail on this defense, there are three elements that must be satisfied: (1) the creditor must extend new value to the debtor; (2) both the creditor and the debtor must intend the new value and reciprocal transfer to be contemporaneous; and (3) the exchange must in fact be contemporaneous. See Cimmaron Oil Co., Inc., v. Cameron Consultants, Inc., 71 B.R. 1005, 1008 (N.D. Tex. 1987). Under Section 547(g), the creditor bears the burden of proving the transfer is not avoidable under Section 547(c).

Defendant argues that on or about January 29, 2013, it issued Invoice #10118-01 in the amount of $18,135.00 to Debtor for work performed on the Switch Project through December 31, 2012 pursuant to the Subcontract Agreement. See MSJ Exhibit "4." Defendant included with its Invoice #10118-01, a statutory Conditional Waiver and Release upon Progress Payment. See MSJ Exhibit "5." On January 29, 2013, Defendant also issued Invoice #10118-02 in the amount of $18,135.00 to Debtor for work performed on the Switch Project through January 31, 2013 pursuant to the Subcontract Agreement. See MSJ Exhibit "6." Defendant included with its Invoice #10118-02, another statutory Conditional Waiver and Release upon Progress Payment. See MSJ Exhibit "7." Both Conditional Waivers issued by the Defendant provide that:

> Upon receipt by the undersigned of a check in the above-referenced Payment Amount payable to the undersigned, and *when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release* and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above-described Property . . .

(emphasis added). MSJ Exhibits "5" and "7."

Defendant argues that release of inchoate lien rights provides new value under In re J.A. Jones, Inc., 361 B.R. 94, 103 (Bankr. W.D.N.C. 2007). Based on the North Carolina bankruptcy court's analysis in J.A. Jones, Defendant maintains that if it had not received payment from the Debtor, "SWSC certainly would have recorded a notice lien against the Switch property and obtained payment from the owner through the lien process. In response, Switch assuredly would have hauled Big Town into the foreclosure action on an indemnity claim." Reply at 6:28-7:1-3. Defendant argues that the avoidance of the future liability from Switch for the money the Debtor

paid to the Defendant represents a contemporaneous exchange for new value. Id. at 7:4-8.

Defendant's reliance on J.A. Jones, however, appears to be misplaced. The Swanson Affidavit is based on information and belief, and as a vice president of the Defendant, the affiant's speculation as to what the Defendant would have done had it not been paid is subject to credibility disputes that cannot be resolved on summary judgment. More important, the affiant's speculation on what the Switch Project owner would have done is even more glaring. As the court observed in J.A. Jones:

> A close reading of the cases reveals that the primary variant in these cases is whether, at the time of the preference payment, the owner still owed sufficient sums to the debtor on the project to permit a setoff against the owner's payment to the sub. If the owner still owes the debtor, then its indemnity claim can be setoff and is secured. In this context, most courts consider the 'indirect transfer' to provide new value. If there is no debt to setoff, however, then the owner's claim for indemnification is simply an unsecured debt and there is no 'new value.'

361 B.R. at 103. (emphasis added). In this case, there is no evidence whatsoever establishing whether the Switch Project owner owed funds to the Debtor that could have been subject to setoff. Thus, even if this court were persuaded by the analysis in J.A. Jones, a genuine issue of fact would exist that would preclude summary judgment.

In contrast, several courts have concluded that waiver of the right to perfect a lien is not an exchange of "new value" within the meaning of Section 547(a)(2) as a matter of law. See United Rentals, Inc. v. Angell, 592 F.3d 525, 532-533 (4th Cir. 2010) (A creditor who did not file a mechanic's lien did not have a lien to release; thus, discharge of the creditor's inchoate lien right did not constitute new value); Cimmaron Oil Co., Inc. v. Cameron Consultants, Inc., 71 B.R. at 1009 (Congress meant a precise definition when it listed what constitutes new value and could have allowed courts to expand upon the doctrine by legislating that new value includes certain transactions.); Fredman v. Milchem, Inc. (In re Nucorp Energy, Inc), 80 B.R. 517, 519 (Bankr. S.D.Cal. 1987).

In an unpublished decision, the Bankruptcy Appellate Panel ("BAP") for this circuit addressed a similar situation in In re Nucorp Energy, Inc., 1989 WL 207914 at *6 (1989), where it concluded that: "The language of §547(a)(2) and the basic policy considerations underlying

the preference provisions lead to the conclusion that *the forbearance from asserting an inchoate statutory lien cannot constitute 'new value.'*" (emphasis added). The BAP went further stating that "even if this court were to engage in an equivalency of value analysis, Addison's forbearance would still be insufficient to constitute 'new value' as a matter of law, because the bankruptcy court correctly decided that the liens had no economic value on the date payment was received." Id.

In a subsequent Ninth Circuit decision in the Nucorp Energy bankruptcy case regarding a different adversary proceeding with similar issues, see Milchem, Inc. v. Fredman (In re Nucorp Energy, Inc.), 902 F.2d 729, 733 (9th Cir. 1990), the circuit panel stated that "[t]his court does not need to determine whether a creditor's forbearance of its right to perfect a lien is a release of property constituting an exchange for new value since the lien against the property was valueless in this case." Id. at 732 n.3. The circuit panel focused on measuring the new value given, stating that "[e]xamination of section 547 shows clearly that its purpose was to accomplish proportionate distribution of the debtor's assets among its creditors, and therefore to prevent a transfer to one creditor that would diminish the estate of the debtor that otherwise would be available for distribution to all. In order to carry out this purpose, '[a] court must measure the value given to the creditor and the new value given to the debtor in determining the extent to which the trustee may void a contemporaneous exchange.'" Id., quoting In re Jet Florida Systems, Inc., 861 F.2d 1555, 1558-59 (11th Cir. 1988).[11]

The bankruptcy court for the District of Oregon applied this approach where an individual debtor granted a security interest in certain personal assets to a creditor in exchange for a release of a security interest in an asset in which the debtor did not have title. See In re Knowling, 2011 WL 2632153 at *5-6 (Bankr. D. Ore. 2011). Such a release provided no value whatsoever to the debtor and therefore could not constitute an exchange of "new value" within

[11] The bankruptcy trustee argued that creditor never filed a lien and therefore had no lien to release when the debtor paid the obligation. As a result, the creditor failed to show that there was a contemporaneous exchange for new value intended or otherwise. 902 F.2d at 733 n. 4. The Trustee in the instant case asserts this same argument. The Ninth Circuit stated, however, that "[a] decision concerning this contention is deemed unnecessary, in light of our conclusion that the 'exchange' did not provide new value to the debtor." Id.

the meaning of Section 547(a)(2).

Based on the foregoing, there appears to be no basis on which this court could or should conclude that the Conditional Waiver and Release constitutes new value under Section 547(a)(2). But even so, Defendant never specifically addresses the second and third elements that it must prove under Section 547(c)(1), i.e., that both parties intended the exchange of new value and the payment to be contemporaneous, and that the exchange in fact was contemporaneous. The Conditional Waiver and Release provided with the subject invoices expressly stated that the release of all claims and lien rights is effective *"when the check has properly been endorsed and has been paid by the bank on which it is drawn."* See MSJ Exhibits 8 and 9. Nothing in the Swanson Affidavit or the exhibits attached to the MSJ, however, establish when the checks were endorsed and paid by the issuing bank. Because both invoices were on payments terms of "net 30" days, and each of the invoices were dated approximately 80 days before each check was issued by the Debtor, it is not clear whether the payments were in fact substantially contemporaneous.

Additionally, there is no evidence whatsoever as to the parties' intent. Although NRS 624.624(2)(b) provides that a higher-tired contractor may "[r]equire as a condition precedent to the payment of any amount due, lien releases furnished by the lower-tiered subcontractor and his or her lower-tiered subcontractors and suppliers in accordance with the provisions of paragraphs (a) and (c) of subsection 5 of NRS 108.2457," there is no such language or condition precedent expressly stated in the Subcontract Agreement. As there was no written agreement to provide these Conditional Waivers, it appears that the Defendant was under no contractual obligation to provide such Conditional Waivers of these lien rights with the progress payment invoices. Although the Defendant asserts that it intended there to be a contemporaneous exchange of new value, there is nothing in the record evidencing the Debtor's intention.

On this record, a contemporaneous exchange defense under Section 547(c)(1) is not available. Thus, just as the Defendant has not met its burden on summary judgment with respect to the transfer of property of the debtor, it also has not met its burden on this affirmative defense.

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CONCLUSION

Defendant has failed to meet its burden on summary judgment and the MSJ therefore must be denied. A separate order denying summary judgment has been entered contemporaneously with this Memorandum Decision.

Copies sent to all parties via BNC and via CM/ECF ELECTRONIC FILING

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