



**IT IS ORDERED** as set forth below:

**Date: October 14, 2008**

**W. H. Drake**  
**U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBERS</b>
	:	
SUDCO, INC.,	:	BANKRUPTCY CASE
	:	NO. 04-17205-WHD
Debtor.	:	
-----	:	
	:	
JANET WATTS, Trustee,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 05-1127
v.	:	
	:	
CRANE GRADING COMPANY,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Motion for Summary Judgment filed by Janet Watts (hereinafter the "Plaintiff"). The Motion arises from a complaint filed by the

Plaintiff against Crane Grading Company (hereinafter the “Defendant”), in which Plaintiff seeks to avoid and recover a preferential transfer made by Sudco, Inc (hereinafter the “Sudco”) to the Defendant. This matter constitutes a core proceeding within the subject matter jurisdiction of the Court, *see* 28 U.S.C. §157 (b)(2)(F), and it shall be disposed of in accordance with the following reasoning.

#### **FINDINGS OF FACT**

1. Michael Suddeth served as the President of Sudco. [Affidavit of Michael Suddeth, ¶2].
2. Sudco hired the Defendant to perform services and supply materials for the City of Cartersville Project. [Affidavit of Michael Suddeth, ¶4; Defendant’s Response to Plaintiff’s Request for Production of Documents, Invoice #50].
3. Sudco’s payment to the Defendant was due on October 18, 2003. [Plaintiff’s Statement of Undisputed Material Facts, ¶3; Defendant’s Response to Plaintiff’s Request for Production of Documents, Invoice #50].
4. On December 16, 2003, Sudco drafted check #2923 in the amount of \$15,000 for payment of Invoice #50 to the Defendant. [Affidavit of Michael Suddeth, ¶ 5 and Exhibit A; Plaintiff’s Statement of Undisputed Material Facts, ¶¶ 3, 4].
5. The Defendant received check #2923 on January 2, 2004. [Defendant’s Response to Plaintiff’s Request for Production of Documents, Invoice #50 and Deposit Detail].

6. Bartow County Bank honored check #2923 on January 16, 2004. [Plaintiff's Statement of Undisputed Material Facts, ¶ 4; Affidavit of Michael Suddeth, ¶ 5 and Exhibit A].
7. The Defendant was Sudco's creditor at the time of the transfer. [Plaintiff's Complaint, ¶8, Defendant's Answer to Complaint, ¶ 9].
8. The transfer was made for the benefit of the Defendant as a creditor. [Plaintiff's Complaint, ¶9; Defendant's Answer to Complaint, ¶ 9].
9. Sudco filed a voluntary petition under Chapter 7 of the Bankruptcy Code on April 8, 2004. [Plaintiff's Statement of Undisputed Material Facts, ¶ 5; Case No. 04-17205].
10. The 90- day period prior to the filing of Sudco's Chapter 7 petition commenced on January 9, 2004.
11. On October 14, 2004, the Plaintiff was appointed as Chapter 7 Trustee of Sudco's estate. [Case No. 04-17205].
12. The bar date for filing claims in Sudco's bankruptcy case has expired. The claims filed in Sudco's case exceed \$1.6 million. The Plaintiff has collected funds in the amount of \$147,598.98. [Plaintiff's Statement of Undisputed Material Facts, ¶¶ 6-8; Affidavit of Janet Watts, ¶ 3].
13. The only asset left to recover is another avoidable preference, the recovery on which would not exceed \$194,000. [Plaintiff's Statement of Undisputed Material Facts, ¶¶ 9-11; Affidavit of Janet Watts, ¶¶ 4-5].

## CONCLUSIONS OF LAW

Pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, Rule 56 of the Federal Rules of Civil Procedure is applicable to adversary proceedings. *See* FED. R. BANKR. P. 7056. Rule 7001 of the Federal Rules of Bankruptcy Procedure defines an adversary proceeding to include actions to recover money or property. *See* FED. R. BANKR. P. 7001.

This Court may enter summary judgment if “there is no genuine issue as to any material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All evidence must be viewed in the “light most favorable to the non-moving party.” *Hairston v. Gainesville Sun Publ’g Co.*, 9 F.3d 913, 918 (11th Cir. 1993). A genuine issue is one that has a “real basis in the record” and upon which a reasonable jury could return a verdict for the non-moving party based on the admitted evidence. *Id.* at 919. Whether a fact is material is determined by reference to the applicable substantive law. *See Anderson*, 477 U.S. at 248. The moving party carries the initial burden to prove there are no genuine issues of material fact. *Hairston*, 9 F.3d at 918. Once the movant meets its burden, the burden shifts to the non-moving party to demonstrate the existence of a genuine issue of material fact. *See id.* The non-moving party does not satisfy its burden and overcome a proper motion for summary judgment by simply showing the existence of an “alleged factual dispute between the parties.” *Anderson*, 477 U.S. at 247-8. Furthermore, according to Rule 56(e)(2) of the Federal Rules of Civil Procedure, the non-moving party may not “rely

merely on allegations or denials in its own pleadings” to oppose a proper motion for summary judgment. FED. R. CIV. P. 56(e)(2); *see also Sec. & Exch. Comm’n v. Spence & Green Chem. Co.*, 612 F.2d 896, 900 (5th Cir. 1980). The non-moving party is obligated to respond to the motion and list specific facts which indicate a “genuine issue for trial.” *Id.* If the non-moving party fails to respond, and summary judgment is appropriate, the court should grant the motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. at 322. *See also* Fed. R. CIV. P. 56(e)(2).

In this case, Defendant failed to respond to Plaintiff’s motion for summary judgment. Nonetheless, the Court must determine if summary judgment is appropriate in this matter. Section 547(b) of the Bankruptcy Code grants a trustee the power to avoid certain prepetition transfers of an interest in the debtor’s property. *See* 11 U.S.C. § 547(b). To invoke the authority of section 547(b), the trustee must satisfy all five elements. *Id.*; § 547(g). Specifically, the trustee may avoid any pre-petition transfer of an interest of a 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 date of 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 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) 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).

Here, the Plaintiff has clearly shown through her motion and all supporting documents that the elements of 547(b) have been met. As to subsections 547(b)(1), (2), and (4), the Court finds that the Defendant, a creditor of Sudco, received a transfer for its benefit and on account of an antecedent debt within the 90 days preceding the filing of Sudco's petition. The existence of the antecedent debt is evidenced by the Defendant's invoice to Sudco for an amount certain, which requests payment by October 18, 2003. The transfer of an interest in Sudco's property is evidenced by check number 2923, written in the amount of \$15,000 and payable to Defendant. The memo portion of the check indicated that the payment was for invoice #50. This information is corroborated by Defendant's deposit detail and invoice, which states the check number, amount, date of receipt, and application to Sudco's outstanding account. Finally, January 9, 2004 marked the first day of the 90 day-period prior to the filing of Sudco's petition. Although Sudco gave Defendant the check prior to the 90-day period, it was honored by the bank on January 16, 2004, which was inside the 90 day-period. Although the Defendant possessed the check outside the 90-day period, he did not obtain a right to Sudco's funds at that time. *Barnhill v. Johnson*, 503 U.S. 393, 399 (1992) ("receipt of a check gives the recipient no right in the funds held by the bank on the drawer's

account.”). The transfer in this case did not occur until the bank honored Sudco’s check because, “‘transfer’ as defined by §101(54) occurs on the date of honor, and not before.” *Id.* at 400.

The Court also finds sufficient evidence to satisfy the requirements of sections 547(b)(3) and 547(b)(5). First, Sudco is presumed to have been insolvent during the 90-day period prior to the filing of its bankruptcy petition. *See* 11 U.S.C. § 547(f). Accordingly, Plaintiff has established that Sudco was insolvent at the time of the transfer. Second, the Plaintiff has met the requirement of section 547(b)(5) by demonstrating that the \$15,000 received by the Defendant prepetition is substantially more than the Defendant would have received if it had filed a proof of claim in Sudco's Chapter 7 case. The approximately \$1.6 million of claims will be paid a pro rata share of, at the most, \$342,138.98. Clearly, the Defendant's claim would not have been paid in full if the Defendant had not been paid prior to the filing of the petition.

Once a trustee establishes the existence of a preference, recovery is permitted in accordance with section 550(1) if the trustee seeks to recover property from “the initial transferee of such transfer or the entity whose benefit such transfer was made.” 11 U.S.C. §550(1). In its answer to the complaint, the Defendant specifically admitted paragraph 9 of the complaint, which states “[t]he transfer was made to or for the benefit of the Defendant as a creditor.” *See* Defendant’s Answer, ¶9; Plaintiff’s Complaint, ¶9). The Plaintiff has met her burden under section 550(1).

The Defendant has failed to respond to the Plaintiff's motion or to pursue any affirmative defenses to the Plaintiff's Complaint. Accordingly, the Court finds that the Plaintiff has shown the absence of genuine issues of material fact and that she is entitled to judgment as a matter of law.

**CONCLUSION**

Having given this matter its careful consideration, the Court hereby concludes that the Plaintiff's Motion for Summary Judgment should be, and hereby is, **GRANTED**. The \$15,000 transfer from Sudco to the Defendant is hereby avoided and may be recovered from Crane Grading Company, pursuant to 547(b) and 550(a) of the Bankruptcy Code. A judgment for the Plaintiff shall be entered concurrently with this Order.

**END OF DOCUMENT**

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