IT IS ORDERED as set forth below:

Date: January 04, 2008

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re:	:	BANKRUPTCY CASE NUMBERS
	:	04-43097 through 04-43106
GALEY & LORD, INC., et al.,	:	
	:	Jointly Administered Under Case No.
Debtor,	:	**04-43098-MGD**
	:	
S. GREGORY HAYS, in his capacity as	:	ADVERSARY CASE NUMBER
as Chapter 7 Trustee for	:	**06-4134-MGD**
GALEY & LORD, INC., et al.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
NANO-TEX, INC.,	:	CHAPTER 7
	:	
Defendant.	:	

ORDER

This matter comes before the Court on the Defendant's Motion for Relief From Admission (the "Motion") pursuant to Bankruptcy Rule 7036 (Docket No. 26). The Trustee filed a timely

Response to the Motion (Docket No. 34), and Defendant filed a timely Reply (Docket No. 40). For the reasons set forth below, the Defendant's Motion is **GRANTED**.

The Trustee commenced the above-styled adversary proceeding on July 27, 2006 to collect alleged preference transfers, pursuant to 11 U.S.C. § 547(b), totaling $1,331,436.00 from the Defendant (Docket No. 1). The Defendant filed a timely answer and asserted several defenses under § 547(c) of the Bankruptcy Code (Docket No. 5). On October 25, 2006, the Trustee served its first set of discovery requests, including a Request for Admissions, and the Defendant provided timely responses to the Request for Admissions. In the Motion before the Court, the Defendant now seeks relief from its admission to number 9 of the Trustee's Request for Admissions. The Defendant's response admitted the statutory preference element of § 547(b)(5) which provides:

> (b) [T]he trustee may avoid any transfer of an interest of the debtor in property
> . . .
> (5) that enables such creditor to receive more than such creditor would receive if
> (A) the Debtors' bankruptcy case were cases under chapter 7 of this title;
> (B) the transfers had not been made; and
> (C) such creditor received payment of such debt to the extent provided by provisions of this title.

11 U.S.C. § 547(b)(5).

On June 5, 2007, the discovery deadline was extended to August 30, 2007. On August 24, 2007, the Defendant filed a substitution of counsel notice with the Court, and new counsel sent the Trustee a letter explaining its theory of a complete defense based upon *In re Kiwi International Air Lines, Inc.*, 344 F.3d 311 (3d Cir. 2003) and related case law (Docket No. 34, p. 5). The Defendant's complete defense is based upon the legal theory that Section 547 and Section 365 are mutually

exclusive avenues for a trustee. *Kimmelman v. Port Auth. of N.Y. & N.J. (In re Kiwi Internat'l Air Lines, Inc.)*, 344 F.3d 311, 319 (3d Cir. 2003); *Steege v. AT&T (In re Superior Toy & Mfg. Co., Inc.)*, 78 F.3d 1169, 1174 (7th Cir. 1996). The Defendant explains that prior counsel relied on a faulty assumption that the alleged preference payments related to a contractual agreement that had not been assumed in the final sale order of substantially all of the Debtor's assets (Main Case No. 04-43098, Docket No. 256).

On September 26, 2007, the Trustee filed a motion for summary judgment in the principal amount of $434,214.00 (Docket No. 15). The Trustee referenced the Defendant's admissions in support of its argument that no material facts were in dispute. On September 28, 2007, the Defendant filed a motion for summary judgment asserting that it has a complete defense because the alleged preferential transfers related to cure payments and contractual payments on an assumed executory contract (Docket No. 19). On October 16, 2007, the Defendant filed a timely response to the Trustee's motion for summary judgment and this Motion. (Docket Nos. 24 and 27).

Rule 36 of the Federal Rules of Civil Procedure, made applicable to the Bankruptcy Court by Rule 7036 of the Federal Rules of Bankruptcy Procedure, allows parties to expedite trial by establishing certain material facts as true and thereby narrowing the range of issues at trial. Part (a) permits parties to serve request for admission, and part (b) provides a limited means to withdraw or amend prior admissions. Rule 36(b) states:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation on the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

FED.R.CIV.P 36(b). Rule 36(b) states that admissions are "conclusively established" unless the court permits a motion to withdraw. "The binding effect of an admission under Rule 36 is necessary, so that one may safely avoid the expense and time of preparing the matters that were admitted. Without security of the admission, then the purpose of the rule is defeated." *Advisory Committee's Note to the 1970 Amendments to Rule 36.* The Eleventh Circuit applies a two-part test to determine whether a motion to withdraw should be granted or denied.

> First, the court should consider whether the withdrawal will subserve the presentation on the merits, and second, it must determine whether the withdrawal will prejudice the party who obtained the admissions in its presentation of the case.

Perez v. Miami-Dade County, 276 F.3d 1255, 1264 (11th Cir. 2002) *cert. denied* 537 U.S. 1193 (2003). Both prongs must be satisfied to permit a withdrawal. *Id.* The moving party has the burden of establishing the first prong, and the non-moving party has the burden in establishing the second prong. FED.R.CIV.P 36(b).

The first prong of the test requires that the moving party establish that a withdrawal of an admission will subserve the merits of the case. FED.R.CIV.P 36(b). "Rule 36(b) emphasizes the importance of having the action decided on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." *Smith*, 837 F.2d at 1577 (internal citations omitted). The first prong of the test considers whether "[t]he ascertainment of truth and the development on the merits would be enhanced" by permitting a withdrawal. *Id.* The first prong is "satisfied when upholding the admission would practically eliminate any presentation on the merits of the case." *Perez*, 276 F.3d at 1266 (citing *Hadley v. U.S.*, 45 F.3d 1345, 1348 (9th Cir. 1995)). When an admission relates to a core element, granting the motion to withdraw an admission certainly aids in the developing the merits of the case. *See id.*

Withdrawal of an admission is permitted when the record indicates that the admission is no longer true or that it was based on a faulty assumption. *Atakpa v. Perimeter Ob-Gyn Assocs., P.C.*, 912 F. Supp 1566, 1581 (N. D. Ga. 1994); *Howard v. Sterchi*, 725 F. Supp 1572, 1577 (N.D. Ga. 1989).

The second prong requires the non-moving party to establish that it will be prejudiced by a withdrawal of the admission. FED.R.CIV.P 36(b). "The prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving the case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admission." *Smith*, 837 F.2d at 1578 (quoting *Brook Village N. Assoc. v. General Elec. Co.*, 626 F.2d 66, 70 (1st Cir. 1982)). "A court is more likely to find prejudice when a party seeks to withdraw its admission once trial has already begun." *Perez*, 837 F.2d at 1267 (citing *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985)).

Here, the Defendant seeks relief from an admission of a preference element. Additionally, the admission inhibits the Defendant from asserting its purported complete defense for the action. By allowing the Defendant to withdraw its admission, the Court enhances its ability to ascertain the truth and allow the case to develop on the merits. Further, denying the Defendant relief from its admission would practically eliminate the purported complete defense raised by the Defendant. The Court finds that the first prong of Rule 36(b)'s two-part test is satisfied.

Next, the Trustee asserts that it will be prejudiced by allowing withdrawal of the admission for two reasons. First, the Trustee argues that it relied on the admission. Second, the Trustee argues that the Defendant's delay in making this Motion was prejudicial. Specifically, the Trustee stresses that the Motion was made ten months after the Defendant's discovery responses were served, twenty

days after the Trustee's motion for summary judgment, and after the close of discovery. The Trustee fails to present sufficient prejudice as contemplated by Rule 36(b). Permitting withdrawal of the admission will merely require the Trustee to prove § 547(b)(5) by facts, instead of relying on the admission. The timing of the Motion does not create any additional impediments for the Trustee to gather sufficient facts and evidence to prove § 547(b)(5). The Court will allow additional discovery on this issue if requested by the Trustee. Further, the Trustee's trial position is not compromised by allowing withdrawal of the admission. Therefore, the second prong of the Rule 36(b) two-part test is not satisfied. Accordingly, it is

ORDERED that the Defendant's Motion is **GRANTED.**

It is **FURTHER ORDERED** that the Trustee may supplement his Motion for Summary Judgment and his response to Defendant's Motion for Summary Judgment in light of this Order on or before January 28, 2008 and the Defendant may file a reply within ten (10) days thereafter. The Clerk is directed to resubmit both Motions for Summary Judgment (Docket Nos. 15 and 19) at that time.

END OF DOCUMENT

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