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

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| IN RE:<br><br>NOTJUST ANOTHER CARWASH, INC.,<br><br>Debtors. | CASE NO. 04-90859-MGD<br><br>CHAPTER 7<br><br>JUDGE DIEHL |
| HARRY W. PETTIGREW, Chapter 7 Trustee for the Bankruptcy Estate of NotJust Another CarWash, Inc.,<br><br>Plaintiff,<br><br>v.<br><br>HOEY CONSTRUCTION CO.,<br><br>Defendant. | ADVERSARY PROCEEDING NO. 06-06252-MGD |

**ORDER**

This adversary proceeding is before the Court on cross motions for summary judgment. The Chapter 7 trustee seeks to avoid the transfer by NotJust Another CarWash, Inc. ("Debtor") of a security interest in certain real property to Hoey Construction Co. ("Defendant") as a preference pursuant to § 547(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(F), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. The Court has considered the entire record in the case, including the pleadings, briefs, and other documents submitted by the parties. For the reasons set forth below, Plaintiff's Motion for Summary Judgment is **GRANTED** and Defendant's Motion for Summary Judgment is **DENIED**.

## STATEMENT OF UNDISPUTED MATERIAL FACTS

The material facts of this case are not in dispute.[1] Debtor filed a petition for Chapter 11 relief on February 2, 2004 ("Petition Date"). (Plaintiff's Statement of Undisputed Facts ¶ 1). Harry W. Pettigrew ("Plaintiff") was appointed the Chapter 11 Trustee on May 18, 2005. (*Id.* at ¶ 1). The case was converted to Chapter 7 on August 4, 2005. (Id. at ¶ 5). Plaintiff was appointed the Chapter 7 trustee. (*Id.* at ¶ 6).

Debtor owned and operated a car wash facility on Braselton Highway, Dacula, Gwinnett County, Georgia commonly referred to as the Dacula Facility. (*Id.* at ¶ 10). The Dacula Facility consisted of only real estate. (*Id.* at ¶ 19). Plaintiff commenced this adversary proceeding on May 5, 2006, seeking to avoid the security interest held by Hoey Construction Company ("Defendant") in the real estate as a preference under § 547(b). (Complaint). Defendant's security interest originates from a default judgment entered against Debtor in Gwinnett County Court case number 03-C-06843-S3 ("State Court Action") on September 19, 2003, in the amount of $38,613.46. (*Id.* at ¶ 11).

On September 25, 2003, counsel for Defendant sent a letter to the Clerk of the State Court requesting the issuance of a Writ of Fieri Facias ("Fi. Fa.") based on the judgment. (*Id.* at ¶ 12). The letter also enclosed a $5.00 check for fees associated with issuance and recording of the Fi. Fa. (*Id.* at 12). The Clerk of the State Court deposited the check on October 1, 2003 and the check cleared the bank account of Defendant's counsel on October 3, 2003. (*Id.* at ¶ 13). The

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[1]In Defendant's Response and Statement to Plaintiff's Statement of Undisputed Material Facts (Docket No. 18), Defendant admits all of the items in Plaintiff Trustee's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment (Docket No. 8), except Defendant stated that it was without knowledge sufficient to form a belief as to the truth of Plaintiff's statement that Defendant was insolvent on December 5, 2003.

Fi. Fa., however, was not issued until December 4, 2003 and was recorded in the Gwinnett County General Execution Docket on December 5, 2003. (*Id.* at ¶¶ 14-15). Defendant submitted the affidavit of Brenda Smith, the supervisor of the State Court Clerk's Office in Gwinnett County, in which she states "After a thorough search of the records of this Office, no indication was found as to why the said Writ of Fi Fa was not issued by the Clerk and recorded until December 5, 2003, other than it simply was not done in a timely fashion in accordance with the typical standards of this Office. The Writ of Fi Fa should have been processed by this Office and filed on the public records of Gwinnett County, Georgia, prior to November 4, 2003." (Smith Aff. ¶ 3[2]).

On March 8, 2004, Debtor filed a motion to sell the Dacula Facility. (*Id.* at ¶ 18). An order approving the sale was entered on April 7, 2004. (*Id.* at ¶ 20). On April 1, 2004, after the filing of the Motion to Sell, but prior to the sale order, Defendant filed its proof of claim (Claim No. 10), as an unsecured, nonpriority claim in the amount of $38,613.46, with a copy of its judgment and Fi. Fa. attached. (*Id.* at ¶ 22). Subsequently, on June 18, 2004, Defendant filed an objection to Debtor's motion to dismiss the bankruptcy case, claiming a security interest in the proceeds of the sale of the Dacula Facility as a result of the judgment and Fi. Fa. against Debtor. (*Id.* at ¶ 23). Debtor then withdrew its motion. Debtor and Defendant filed a consent motion seeking authority to distribute $40,478.78 to Defendant from the proceeds of the sale of the Dacula Facility in satisfaction of its claim. (*Id.* at ¶ 24). The United States Trustee filed an objection to the consent motion. (*Id.* at ¶ 25). When the matter came before the Court on

[2]In Trustee's Response to Defendant's Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment (Docket No. 21), Plaintiff states that he accepts paragraph 3 of the Brenda Smith's affidavit as an undisputed fact.

September 2, 2004, the parties requested that the motion be removed from the Court's calendar and "reset on request." The parties never requested a reset of that matter.

On June 8, 2006, Defendant amended its proof of claim (Claim No. 34) to show a secured claim in the amount of $39,439.11. (*Id.* at ¶ 27). Plaintiff holds proceeds from the sale of the Dacula Facility in an amount in excess of Defendant's claim. (*Id.* at ¶ 28). No other creditor asserts a secured interest in the Dacula Facility. (*Id.* at ¶ 29). In total, Plaintiff holds $325,221.38 in funds of the estate. (*Id.* at ¶ 31). As of September 1, 2006, claims against the estate asserting priority status total $280,657.13. (*Id.* at ¶ 32). Additionally, as of September 1, 2006, general unsecured claims total $2,592,306.78. (*Id.* at ¶ 33).

**Standard for the Court to Grant Summary Judgment**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is authorized when all the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In assessing whether a "genuine issue" for trial exists, the Court must consider all the evidence and factual inferences reasonably drawn from the evidence in a light most favorable to the nonmoving party. *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000). "The party seeking summary judgment bears the initial burden to demonstrate to the court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact . . . . If the

movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going beyond the pleadings, that there exist genuine issues of material facts." *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

**Conclusions of Law**

In accordance with § 547(b), Plaintiff seeks to avoid the transfer of a security interest in the Dacula Facility to Defendant as a preferential transfer. To prevail on a preference action under § 547(b), Plaintiff must establish the transfer (1) was 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 on or within 90 days before the date of the filing of the petition or 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) enables the creditor to receive more than the creditor would receive in a Chapter 7 liquidation. 11 U.S.C. § 547(b).

The parties agree that all the elements have been satisfied, except they dispute whether the transfer occurred within the preference period.[3] Plaintiff contends the transfer occurred for

[3] Defendant stated in response to Plaintiff's Statement of Undisputed Facts that it was without knowledge sufficient to form a belief as to the truth of the claim that Debtor was insolvent at the time of the transfer. Defendant, however, did not raise this issue in his motion for summary judgment or in response to Plaintiff's motion for summary judgment. Moreover, while Plaintiff submitted the affidavit of Jeffrey K. Kerr, CPA for the Trustee, stating that, based on analysis of Debtor's 2003 Tax Return Schedule of Assets and Liabilities, Debtor was insolvent on December 5, 2003, Defendant has not presented any evidence of Debtor's solvency at the time of the transfer. To the extent that the issue is disputed, the Court concludes that Defendant failed to rebut the presumption under § 547(f) that for ninety days preceding the filing of the debtor's petition, the debtor is insolvent. *See e.g. Loeb v. G.A. Gertmenian & Sons*, (*In re A. J. Nichols, LTD*), 21 B.R. 612, 616 (Bankr. N.D. Ga. 1982).

purposes of § 547(b) within ninety days of the Petition Date on December 5, 2003. Defendant, however, contends the transfer occurred when the judgment was entered on September 19, 2003. Section 547(e) states that for purposes of a preference action a transfer of real property is perfected when "a bona fide purchaser of such property from the debtor against who applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee." 11 U.S.C. § 547(e). Thus, a transfer of real property occurs in accordance with § 547(e) when the transfer is perfected against bona fide purchasers. *Flatau v. ASICS Tiger Corp.* (*In re Wall*), 216 B.R. 1016, 1018 (Bank. M.D. Ga. 1998). To determine when a transfer is perfected, the Court must look at state law. *Id.* Under O.C.G.A. § 9-12-86, a judgment lien becomes perfected as against real property when the judgment lien is recorded on the General Execution Docket in the county in which the real property is located. *Id.*

Defendant contends that O.C.G.A. § 9-12-86 applies only to contractual liens, and therefore, does not apply in this case. In support of its argument, Defendant relies on *Donovan v. Simmons*, 96 Ga. 340, 22 S.E. 966 (1895). Defendant's reliance on *Donovan*, however, is misplaced. In *Donovan*, the plaintiff in fi. fa. received a judgment against the owner of record on April 18, 1893 and recorded the judgment on April 19, 1893. 22 S.E. at 967. The execution on the judgment was levied on October 14, 1893 and the property was advertised for sale by the sheriff in November and December 1893. *Id.* A claim was filed prior to the sale of the property by parties claiming to be the real owners of the property. *Id.* at 966. Apparently, the owner of record had transferred the property by deed to the claimants on May 11, 1891, but the deed was not recorded until November 22, 1893. *Id.* The Court held that the first section of the registry act of 1889, which provided that deeds, mortgages, and liens became effective against the interest of

third parties acting in good faith and without notice only after it is recorded in the office of the clerk of the superior court, does not protect the holder of a recorded judgment lien against an unrecorded deed. *Id.* at 968. The Court held that the unrecorded deed had priority over the recorded judgment lien. *Id.* This section of registry act of 1889 was the precursor to the now codified O.C.G.A. § 44-2-2. The holding in *Donovan* is therefore limited to O.C.G.A. § 44-2-2 and does not prevent the application of O.C.G.A. § 9-12-86 in this case.

Defendant also cites *Harris v. Dickson* (*In re Smith*), 17 B.R. 541 (Bankr. M.D. Ga. 1982), for the proposition that, under O.C.G.A. § 9-12-80, a judgment lien attaches to all property on the date of the judgment. While as a general rule under Georgia law a judgment creditor in Georgia acquires a lien on all the property of the defendant in judgment when it is entered, there are exceptions to this general rule.[4] *In re National Service Direct, Inc.*, 2005 Bankr. LEXIS 298, *8 (Bankr. N. D. Ga. 2005) (Diehl, J.) (citing *Cohutta Mills, Inc. v. Hawthorne Indus., Inc.*, 179 Ga.App. 815, 348 S.E.2d 91 (1986)). The Court in *Smith* recognized this limitation on the general rule in footnote 3, in which it stated "[t]here are certain limitations on this statement as to "all of the property," and one of those limitations will be discussed hereafter . . . ." *Smith*, 17 B.R. at 544 n.3. O.C.G.A. § 9-12-86 provides an exception to the general rule under Georgia law. *National Service*, 2005 Bankr LEXIS at *8 (citing *In re DOTMD, LLC*, 303 B.R. 519 (Bankr. N.D. Ga. 2003); *In re Tinsley*, 421 F.Supp. 1007, 1010 (M.D. Ga. 1976) aff'd, 554 F.2d 1064 (5th Cir. 1977)); *see also In re Arnold*, 40 B.R. 144, 147 n.1 (Bankr. N.D. Ga. 1984) (Drake, J.).

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[4]O.C.G.A. § 9-12-80 provides in pertinent part: "All judgments obtained in the superior courts, magistrate courts, or other courts of this state shall be of equal dignity and shall bind all the property of the defendant in judgment, both real and personal, from the date of such judgments *except as otherwise provided in this Code*." (Emphasis added).

O.C.G.A. § 9-12-86 requires a judgment holder to record the judgment on the General Execution Docket in the county where the real property is located in order to attach a lien on any real property of the debtor. *Id.*

Alternatively, Defendant argues that O.C.G.A. § 9-12-86 only applies to third parties without notice and not to the trustee, who standing in the shoes of Debtor, had notice of the transfer as of the Petition Date. Section 547, however, does not require the trustee to be a bona fide purchaser in order to avoid the transaction as a preference. Section 547(e) merely provides a test or standard by which it can be concluded whether the transaction was complete. Thus, the trustee's imputed knowledge or notice of the transfer is not relevant for purposes of § 547.

The Court concludes that O.C.G.A. § 19-12-86 is the applicable Georgia statute in this case. Thus, Defendant's judgment lien was not perfected as against bona fide purchasers for purposes of § 547(b) until it was recorded on December 5, 2006. For these reasons, the Court concludes the transfer occurred within ninety days of the Petition Date and may be avoided by the trustee as a preference in accordance with § 547.

Finally, Defendant urges the Court to use its equitable powers under § 105 to find that the lien was perfected outside the preference period. Section 105 authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The Court's equitable powers, however, are not unlimited. Section 105 "may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code." *Landsing Diversified Properties-II v. First Nat'l Bank and Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 601 (10th Cir. 1990). To use the Court's equitable powers to find the lien was perfected outside the preference period would

circumvent the clear authority provided to the trustee by the Bankruptcy Code to avoid preference transactions. *In re Summit Financial Services, Inc.*, 240 B.R. 105, 122 (Bankr. N.D. Ga. 1999) (Drake, J.); *Matter of Intl. Gold Bullion Exchange*, Inc. 53 B.R. 660, 667 (Bankr. S.D. Fla. 1985). Therefore, it would be inappropriate for the Court to use its equitable powers to negate the trustee's statutory authorization to avoid the preferential transfer.

In conclusion, the transfer of a security interest in the Dacula Facility by Debtor to Defendant occurred for purposes of § 547(e) when Defendant's judgment lien was recorded on the General Execution Docket in Gwinnett County on December 5, 2003. Thus, the transfer occurred within the preference period in accordance with § 547(b). It would be an abuse of discretion for the Court to use the equitable powers provided under § 105 to find the transfer occurred outside the preference period.

Accordingly, it is **ORDERED** that Defendant's Motion for Summary Judgment is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Summary Judgment is **GRANTED**.

A separate Judgment will be entered contemporaneously herewith.

The Clerk is directed to serve a copy of this Order upon the Plaintiff, Defendant, and Defendant's counsel, and the U.S. Trustee.

**IT IS SO ORDERED**, this 15th day of February, 2007.

Mary Grace Diehl
MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE