

IT IS ORDERED as set forth below:



Date: June 13, 2007

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 04-74967

Southwest Hospital and Medical Center, Inc.,

CHAPTER 11

Debtor.

JUDGE MASSEY

Southwest Hospital and Medical Center, Inc., by
and through its Liquidating Agent, J. Michael
Weathers,

Plaintiff,

v.

ADVERSARY NO. 06-6381

Precision Anesthesia & Associates, LLC,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff brought this adversary proceeding (1) to avoid and recover pursuant to 11 U.S.C. §§ 547 and 550(a) alleged voidable preferences paid by Debtor Southwest Hospital and Medical

Center, Inc. to Defendant Precision Anesthesia & Associates, LLC during the 90-day period preceding the filing of the petition initialing Southwest's Chapter 11 case on September 9, 2004 and (2) to disallow any claims held by Defendant against Southwest until it repays the alleged preferential payments. Defendant answered the complaint, denied the essential factual allegations but raised no affirmative defense under section 547 of the Bankruptcy Code.

On May 3, 2007, Plaintiff filed a motion summary judgment, supported by declarations and a Statement of Material Facts as to Which There Exist No Genuine Issue to Be Tried. Defendant has not responded to the motion or to Plaintiff's Statement of Material Facts as to Which There Exist No Genuine Issue to Be Tried, and hence pursuant to Bankruptcy Local Rule 7007-1, Defendant is deemed not to oppose Plaintiff's motion.

The facts stated in Plaintiff's Statement of Material Facts as to Which There Exist No Genuine Issue to Be Tried satisfy all of the elements of a voidable preference under 11 U.S.C. § 547. Because there is no material fact in dispute, Plaintiff is entitled to summary judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The aggregate amount of the voidable preferences is \$81,700.00.

Plaintiff made a demand on Defendant to repay those preferences on January 20, 2006. It seeks prejudgment interest from that date. "The Bankruptcy Code does not specifically provide for an award of prejudgment interest in the recovery of preferential transfers. *In re Investment Bankers, Inc.*, 136 B.R. 1008, 1023 (Bankr. D. Colo. 1989). The decision to award prejudgment interest in a preferential transfer action is therefore left to the sound discretion of the bankruptcy court. *In re Art Shirt Ltd., Inc.*, 93 B.R. 333, 342 (Bankr. E.D. Pa.1988)." *Lowrey v. Mfrs.*

Hanover Leasing Corp. (In re Robinson Bros. Drilling, Inc.), 1992 WL 535954 (W.D. Okla. 1992). In this instance, an award of interest is appropriate because Defendant had no colorable defense to the claim and therefore might have paid it when the demand was made without giving up any value right or defense. "Prejudgment interest is recoverable in a preference action from the date of demand for its return by the trustee or, if there is no demand, from the date of commencement of the adversary proceeding." *Ellenberg v. Mercer (In re The Home Co.)*, 108 B.R. 357, 360 (Bankr. N.D. Ga. 1989) (Cotton, J.). Most courts concur with this conclusion. See, e.g., *Sigmon v. Royal Cake Co. (In re Cybermech, Inc.)*, 13 F.3d 818, 822-23 (4th Cir. 1994); *McLemore v. Third Nat'l Bank in Nashville (In re Montgomery)*, 983 F.2d 1389, 1396 (6th Cir. 1993). Courts have used several bench marks as the proper interest rate, including the state legal interest rate, the prime rate and the rate under 28 U.S.C. § 1961. This court adopts the approach of Judge Cotton in the *Home Co.* case. "Although section 1961 only provides for post-judgment interest, most courts have concluded that the statute also applies to pre-judgment interest in a case involving a federal question in which there is no express statutory provision for such interest." *In re Home Co.*, 108 B.R. at 360. The Court notes that the federal rate for judgments entered during the week preceding on January 20, 2006 was 4.41% (copy and paste the following URL in a browser: <http://www.federalreserve.gov/releases/h15/20060117>.) This is lower than Georgia's legal rate of 7%. GA. CODE ANN. § 7-4-2 ("The legal rate of interest shall be 7 percent per annum simple interest where the rate percent is not established by written contract.") Prejudgment interest from January 20, 2006 totals \$5,024.42.

Plaintiff is entitled to post-judgment interest as well. Finally, as Plaintiff contends, any claim asserted by Defendant in this bankruptcy case is disallowed pending payment of the judgment entered in connection with this Order.

Plaintiff's motion for summary judgment is GRANTED, and the Court will enter a separate Judgment.

END OF ORDER