



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

**Date: October 04, 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. 06-66726

Metro Builders Supply, Inc.,

CHAPTER 7

Debtor.

JUDGE MASSEY

\_\_\_\_\_  
Robert B. Silliman, Trustee,

Plaintiff,

v.

ADVERSARY NO. 06-6497

Douglas Keith Benson,

Defendant.

\_\_\_\_\_  
ORDER GRANTING IN PART AND DENYING IN PART  
MOTION FOR SUMMARY JUDGMENT

Robert B. Silliman, the Chapter 7 Trustee for the bankruptcy estate of Metro Builders Supply, Inc. (the "Debtor"), brought this adversary proceeding against Defendant Douglas Keith Benson to avoid alleged preferential transfers made by Debtor to Defendant within the one year

period preceding the date on which Debtor filed its petition initiating the above-referenced Chapter 7 case and to recover from Defendant the amount of those transfers with interest from the date of each transfer.

Plaintiff alleged in the complaint that at all times relevant to the allegations in the complaint Defendant was president of the Debtor. He further alleged that Defendant loaned the Debtor a total of \$192,448.81 between September 4, 2003 and August 3, 2004, evidenced by three promissory notes and that Debtor wrote three checks to Defendant each dated June 15, 2005 in the aggregate amount of \$185,948.81, which Defendant thereafter cashed or deposited in his personal account. Those transfer of funds made by Debtor to Defendant are hereafter referred to as the “Transfers.” Plaintiff further alleged that Defendant was insolvent when the Transfers were made and the Transfers enabled Defendant to receive more than he would have received in a case under Chapter 7 if the Transfers had not been made and Defendant had received payment of the debts to the extent provided under title 11 of the United States Code.

In his answer to the complaint, Defendant admitted that at all relevant times he was the president of the Debtor and was an insider of the Debtor. He also admitted that the Transfers to him were property of the Debtor, that he received the Transfers within one year prior to the petition date, that the Transfers were made for or on account of antecedent debts owed by the Debtor to Defendant and that at the time he received the transfers he was a creditor of the Debtor within the meaning of Section 101(10)(A) of the Bankruptcy Code.

These admissions satisfy all of the elements necessary to avoid a preferential transfer to an insider of the debtor set forth in section 547(b) of the Bankruptcy Code, 11 U.S.C. § 547(b), with two exceptions. In his amended answer, Defendant denied that Debtor was insolvent when

the Transfers were made and that the Transfers enabled him to receive more than he would have received in a case under Chapter 7 if the Transfers had not been made and he had received payment to the extent provided by the Bankruptcy Code. Defendant did not raise in his answer any other defense to Plaintiff's claim.

Plaintiff moves for summary judgment and supports the motion with his own affidavit to which he attached the Schedules of Debtor filed in this case and with the affidavit of Eddie Birnbrey, who identified himself as a certified public accountant who assisted the Debtor in preparing its 2004 federal income tax return.

Debtor filed its Schedules of assets and liabilities with the petition initiating the Chapter 7 case on June 9, 2006. The Debtor's president at that time, John R. Hayes, executed a declaration under penalty of perjury that was attached to the Schedules and a summary of the Schedules, stating that he had read the summary and the Schedules and that they were true and correct to the best of his knowledge, information and belief. The Schedules and summary show that as of the petition date, June 9, 2006, the Debtor had assets valued at \$351,768.81 and liabilities of \$2,258,756.20. Mr. Silliman stated in his affidavit that the only viable asset of the estate is this cause of action against Defendant.

Mr. Birnbrey stated in his affidavit that he assisted the Debtor in preparing its 2004 federal income tax return, a copy of which he attached, and that "As illustrated in the Debtor's 2004 tax return, at the beginning of 2005, the Debtor's assets totaled \$1,113,575.00 and its liabilities totaled \$1,892,862.00, resulting in a net difference of (-779,287.00) (sic). . . . The Debtor's financial picture did not improve during the remainder of 2005." Affidavit of Eddie Birnbrey, p. 3. Mr. Birnbrey based his statements on his personal knowledge and review of Debtor's documents and business records. Although Mr. Birnbrey placed a minus sign in from of

the figure "779,287," indicating a negative number and also placed the figure within parentheses, also indicating a negative number (resulting in a positive number), it is clear that the difference between the total of assets and total of liabilities of \$779,287 is a negative number and that Mr. Birnbrey's intention was to point out that the Debtor acknowledged that it was insolvent by almost \$800,000 as of December 31, 2004 in its 2004 federal income tax return.

Plaintiff also submitted with his motion for summary judgment a Statement of Undisputed Facts, which establish all of the elements necessary to show that Defendant received voidable preferences totaling \$185,948.81.

Defendant, who is represented by counsel, did not respond to the motion for summary judgment. Bankruptcy Local Rule 7007-1(c) provides:

(c) Response to Motion. Any party opposing a motion shall file and serve the party's response, responsive memorandum, affidavits, and any other responsive material not later than ten days after service of the motion, except that the time to respond to a motion for summary judgment shall be 20 days. Failure to file a response shall indicate no opposition to the motion.

Rule 56(e) of the Federal Rules of Civil Procedure, made applicable by Bankruptcy Rule 7056 provides:

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The evidence presented by Plaintiff through the affidavits of Messrs. Silliman and Birnbrey show that Debtor was insolvent at the time of the Transfers and that the Transfers enabled Defendant to receive more than he would have received if the Transfers had not been made in a case under Chapter 7 and Defendant had received payment to the extent provided by the Bankruptcy Code. By not responding to the motion for summary judgment, Defendant is deemed not to contest the undisputed facts stated in Plaintiff's Statement of Undisputed Facts or otherwise oppose the motion. Therefore, Plaintiff has established all of the elements of a voidable preference under section 547 of the Bankruptcy Code with respect to each of the three Transfers. Pursuant to section 550(a) of the Bankruptcy Code, Plaintiff is entitled to recover from Defendant the value of the avoided transfers totaling \$185,948.81.

Plaintiff also seeks in the complaint and in the motion pre-judgment interest on the avoided transfers from the dates they were made. In his brief, however, Plaintiff does not mention pre-judgment interest. Nor does he show the date or dates on which the three checks dated June 15, 2005 were honored by Debtor's bank. The Transfers were made on the date or dates the checks were honored, which may or may not be June 15, 2006, the date shown on the checks. Further, Plaintiff does not show that he made any demand on Defendant prior to the date on which Defendant received the summons and complaint. The certificate of service filed by Plaintiff shows that the summons and complaint were served by U.S. Mail on November 6, 2006, which was a Monday. The Court presumes that Defendant received the complaint on November 9, 2006.

The Bankruptcy Code does not specifically provide for an award of pre-judgment interest on the value of avoided preferential transfers. *In re Investment Bankers, Inc.*, 136 B.R. 1008, 1023 (Bankr. D. Colo. 1989). The decision to award pre-judgment 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 has not asserted any defense to the claim other than denying that Debtor was insolvent when he received the Transfers. Thus, Defendant might have repaid those transfers when a proper demand was made without giving up any 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 in adopting the rate prescribed by 28 U.S.C. § 1961. "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. Section 1961 fixes the rate "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." The Court notes that the federal rate under section 1961 for the week preceding November 9, 2006

was 5.00%. Attached to this Order is a copy of the web page of the Federal Reserve showing the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the week ending November 3, 2006. The Internet address for that page is <http://www.federalreserve.gov/releases/h15/20061106/>. This rate 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.") There were 329 days between November 9, 2006 and October 4, 2007. Simple arithmetic shows that pre-judgment interest on \$185,948.81 for that period at 5.00% per annum is \$8,380.43.

Plaintiff is also entitled to interest from the date of the judgment, which will also be entered on October 4, 2007. The appropriate interest rate under 28 U.S.C. § 1961 for post-judgment interest is 4.05%.

Accordingly, Plaintiff's motion for summary judgment is GRANTED except insofar as he seeks pre-judgment interest from the date or dates of the preferential transfers, as opposed to the date of demand, and that portion of the motion is DENIED. The Court will enter a separate judgment.

\*\*\*END OF ORDER\*\*\*

## Federal Reserve Statistical Release


[Skip to Content](#)

H.15

## Selected Interest Rates

Release Date: November 6, 2006

[Release dates](#) | [Daily update](#) | [Historical data](#) | [Data Download](#) | [About](#)
Current release Other formats: [Screen reader](#) | [ASCII](#) | [PDF \(17 KB\)](#)

## FEDERAL RESERVE STATISTICAL RELEASE

H.15 (519) SELECTED INTEREST RATES  
For use at 2:30 p.m. Eastern Time

Yields in percent per annum

November 6, 2006

Instruments	2006 Oct 30	2006 Oct 31	2006 Nov 1	2006 Nov 2	2006 Nov 3	Week Ending Nov 3	Ending Oct 27	2006 Oct
Federal funds (effective) 1 2 3	5.27	5.31	5.23	5.22	5.25	5.25	5.24	5.25
Commercial Paper 3 4 5								
Nonfinancial								
1-month	5.19	5.22	5.19	5.21	5.19	5.20	5.21	5.20
2-month	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	5.23	5.18
3-month	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	5.19
Financial								
1-month	5.24	5.23	5.22	5.24	5.23	5.23	5.23	5.23
2-month	5.23	5.23	5.23	5.24	5.23	5.23	5.23	5.23
3-month	5.23	5.22	5.25	5.24	5.23	5.23	5.24	5.24
CDs (secondary market) 3 6								
1-month	5.27	5.29	5.28	5.28	5.28	5.28	5.28	5.28
3-month	5.32	5.33	5.33	5.33	5.33	5.33	5.33	5.33
6-month	5.34	5.34	5.33	5.32	5.34	5.33	5.36	5.35
Eurodollar deposits (London) 3 7								
1-month	5.32	5.32	5.32	5.32	5.32	5.32	5.32	5.32
3-month	5.37	5.37	5.37	5.37	5.37	5.37	5.37	5.36
6-month	5.38	5.38	5.38	5.35	5.39	5.38	5.40	5.38
Bank prime loan 2 3 8	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Discount window primary credit 2 9	6.25	6.25	6.25	6.25	6.25	6.25	6.25	6.25
U.S. government securities								
Treasury bills (secondary market) 3 4								
4-week	5.07	5.09	5.10	5.10	5.10	5.09	5.04	4.88
3-month	4.97	4.95	4.94	4.94	4.96	4.95	4.99	4.92
6-month	4.96	4.93	4.90	4.93	4.98	4.94	4.98	4.92
Treasury constant maturities								
Nominal 10								
1-month	5.15	5.18	5.19	5.18	5.18	5.18	5.13	4.97
3-month	5.10	5.08	5.07	5.07	5.09	5.08	5.12	5.05
6-month	5.16	5.13	5.10	5.13	5.18	5.14	5.18	5.12
1-year	5.03	4.99	4.95	4.97	5.06	5.00	5.07	5.01
2-year	4.78	4.71	4.66	4.67	4.82	4.73	4.85	4.80
3-year	4.68	4.62	4.56	4.60	4.74	4.64	4.78	4.72
5-year	4.64	4.57	4.52	4.55	4.70	4.60	4.74	4.69
7-year	4.64	4.57	4.52	4.56	4.70	4.60	4.74	4.69
10-year	4.68	4.61	4.57	4.60	4.72	4.64	4.77	4.73
20-year	4.88	4.81	4.77	4.80	4.90	4.83	4.97	4.94
30-year	4.78	4.72	4.68	4.72	4.81	4.74	4.89	4.85
Inflation indexed 11								
5-year	2.51	2.47	2.41	2.44	2.52	2.47	2.57	2.51
7-year	2.44	2.40	2.34	2.38	2.45	2.40	2.50	2.45
10-year	2.39	2.34	2.29	2.32	2.40	2.35	2.45	2.41
20-year	2.34	2.28	2.24	2.28	2.34	2.30	2.42	2.38
Inflation-indexed long-term average 12	2.30	2.24	2.20	2.24	2.29	2.25	2.38	2.34
Interest rate swaps 13								
1-year	5.34	5.32	5.27	5.28	5.36	5.31	5.41	5.37
2-year	5.15	5.11	5.04	5.06	5.18	5.11	5.26	5.19
3-year	5.10	5.05	4.99	5.01	5.14	5.05	5.21	5.15
4-year	5.10	5.05	4.99	5.01	5.13	5.05	5.21	5.15
5-year	5.11	5.06	5.00	5.02	5.15	5.07	5.22	5.16
7-year	5.15	5.10	5.04	5.06	5.18	5.11	5.26	5.21